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No. 98-1137

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

THE COUNTY COUNCIL OF VOLUSIA COUNTY, FLORIDA, a political subdivision of the State of Florida,
Petitioner,

v.

LOGGERHEAD TURTLE (Caretta caretta), GREEN TURTLE (Chelonia mydas), SHIRLEY REYNOLDS, and RITA ALEXANDER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICI CURIAE* OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

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Pursuant to Rule 37.2(b) of the rules of this Court, the Washington Legal Foundation (WLF) respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of Petitioner. Respondents have consented to the filing of this brief, and their letter of consent has been lodged with the clerk of the Court. But Petitioner has withheld its consent, requiring WLF to present the Court with this motion.

WLF is a nonprofit public interest law and policy center based in Washington, D.C., with supporters in all 50 States. WLF regularly appears in legal proceedings before federal and state courts to defend and promote free enterprise and individual rights.

WLF has appeared before this Court in several cases involving the interpretation and application of the Endangered Species Act (ESA), 16 U.S.C. §§ 1531–44 (1994). *See, e.g., Bennett, et al. v. Spear, et al.*, 117 S.Ct. 1154 (1997); *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995). In addition, WLF has appeared before this Court in cases involving federalism and the Tenth Amendment. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452 (1991). WLF thus brings a broader perspective to the Question Presented than that offered by the parties to this case.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on several occasions.

For the foregoing reasons, WLF and AEF request that the Court grant this motion to file their brief *amici curiae* in support of Petitioner.

Respectfully submitted,

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QUESTION PRESENTED

Whether a county government can be held responsible under the Endangered Species Act by a federal court for the acts of private citizens because of its failure to regulate beachfront lighting.

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INTEREST OF *AMICI CURIAE*

The interest of Washington Legal Foundation and Allied Educational Foundation are set forth in the motion accompanying this brief.[1]

STATEMENT

Along the northeast coast of Florida lie the beachfront communities of Volusia County, a "political subdivision[ ]" of the State of Florida. FLA. CONST. art. VIII, § 1(a). Volusia County is governed according to a home rule charter, which its people adopted through a special election pursuant to the Florida Constitution. *See id.* at § 1(c). As with all "[c]ounties operating under county charters" in Florida, Volusia County has "all powers of local self-government." *Id.* at § 1(g). Among such powers, Petitioner County Council of Volusia County (County) may "enact county ordinances." *Id.* County ordinances supply the only source of local regulation in unincorporated areas, such as Ormond-by-the-Sea, Wilbur-by-the-Sea, Bethune Beach, and the Town of Ponce Inlet. However, incorporated municipalities, such as Daytona Beach, Daytona Beach Shores, Ormond Beach, and New Smyrna Beach, are governed both by county and municipal ordinances. Conflicts between the ordinances are resolved according to the terms of the county charter. *See id.*

Three sections of the Volusia County Home Rule Charter are relevant to this case. Section 202.4 directs the County to "establish minimum standards, proce-

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[1] Pursuant to Supreme Court Rule 37.6, the Washington Legal Foundation states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than the Washington Legal Foundation and its counsel, contributed monetarily to the preparation and submission of this brief.

dures, requirements and regulations for the protection of the environment." Pet. App. 143. Such regulations "shall apply within all the incorporated and unincorporated areas of Volusia County," except that "the governing body of each municipality may establish more restrictive standards . . . for the protection of the environment." *Id.* Section 205.2 authorizes the County "to enact an ordinance . . . comprehensively regulating public health, safety, and welfare on and pertaining to the beach . . . ." *Id.* at 144. And Section 205.5 gives the County "exclusive authority to regulate the beaches and public beach access and use." *Id.* at 145. Although county ordinances adopted under this section "prevail in the event of conflict with a municipal ordinance," *id.* at 146, "unless otherwise agreed, the county will not be liable for any act of a municipality." *Id.* at 145.

Pursuant to its authority under the charter, the County adopted Ordinance 89-60 (Ordinance), *codified at* Volusia County Code, art. III, §§ 50-241–50-251, which regulates beachfront lighting to protect sea turtles from injury. *See id.* at 147-59. As the Eleventh Circuit understood it, the Ordinance divides its restrictions into three categories: "(1) lights associated with new development; (2) lights associated with existing development; and (3) lights that are publicly owned." *Id.* at 38. Lighting from new development is regulated by every municipality at issue; each has either adopted regulations that complied with the minimum standards established by the County or has agreed to submit to regulation by the County. *See id.* Lighting from existing development and publicly-owned lighting follows a different pattern. The Ordinance exempts Daytona Beach and Daytona Beach Shores from regulation, and Ormond Beach

and New Smyrna Beach enforce their own regulations, as approved by the County. *See id.* at 39.

Volusia County is home to various species of sea turtles, of which two are named parties to this case. The Loggerhead Turtle is listed by the U.S. Fish and Wildlife Service (Service) as a threatened species. *See* 50 C.F.R. § 17.11(h) (1997). In Florida, the Green Turtle is listed as an endangered species. *Id.*

This case arose when Respondents filed a complaint against the County, seeking declaratory and injunctive relief. They alleged, *inter alia*, that the County's refusal to "ban beachfront artificial lighting sources that adversely impact sea turtles," Pet. App. 183, harms threatened or endangered species, in violation of the Endangered Species Act. 16 U.S.C. §§ 1531–44. (1994) (ESA or Act). They cited federal recovery plans which say that artificial lighting can disorient or misorient hatchlings and impel female turtles to avoid nesting where the beach is artificially illuminated. *See* Pet. App. 168–70.

The County filed a motion for partial summary judgment. It argued that Respondents lack standing to bring a claim under the ESA against the County for takes of listed sea turtles caused by beachfront lighting in the incorporated municipalities of Daytona Beach, Daytona Beach Shores, Ormond Beach, and New Smyrna Beach (Municipalities). The court granted the motion "on the artificial beachfront lighting issue," Pet. App. 84 (July 9, 1996 Order), and Respondents appealed.

A divided panel of the Eleventh Circuit reversed and remanded "for further proceedings consistent

with [its] opinion, including a trial on artificial beachfront lighting . . . ." *Id.* at 64. It concluded that Respondents have standing to sue the County under the ESA "for its regulatory actions affecting light users," *id.* at 63, in the Municipalities. In addition, the court reached out to address substantive issues regarding the County's liability under the Act.

First, the majority left no doubt that the County's regulation of beachfront lighting will be the central issue on remand.

Ormond Beach and New Smyrna Beach have adopted independent ordinances regulating beachfront lighting. *See id.* at 42–43. For this reason, the court found that Respondents could not sue the County for "inadequate enforcement efforts," *id.* at 43, in those municipalities. "This absence of *enforcement* control on Volusia County's part, however, does not defeat the Turtles' standing to sue for inadequate *regulation* . . . ." *Id.* To sever liability for inadequate enforcement from liability for inadequate regulation, the majority directed the district court to assume that Ormond Beach and New Smyrna Beach fully enforce their own ordinances.

> This assumption will focus the trier of fact solely on the regulatory acts of Volusia County in determining whether the Minimum Environmental Standards for Sea Turtle Protection as contained within [the Ordinance] cause "harm" (*e.g.*, insufficient on their face to prevent "harm") to sea turtles in Ormond Beach and New Smyrna Beach.

Id. at 43-44. The court added that the County could avoid liability by proving that its ordinance "if fully enforced, would prevent 'harm' to the Turtles." *Id.* at 44.

Daytona Beach and Daytona Beach Shores are exempted from regulation under the Ordinance. For that reason, the majority panel said that the only genuine issue, for purposes of determining liability, centers on the regulatory acts and omissions of the County in those municipalities.

> At trial, the trier of fact's inquiry can simply be whether the lack of artificial beachfront lighting restrictions in Daytona Beach and Daytona Beach Shores causes "harm" to sea turtles in those locations.

Id. Once again, the majority assured the County that it could defend itself against Respondents' claims by proving that the Ordinance does not injure the turtles, either because "protected sea turtles do not nest or shelter in those locations and/or unrestricted lighting does not 'harm' them." *Id.*

Second, the court of appeals defined the district court's authority to fashion effective relief for Respondents in the broadest terms. It acknowledged that "unique constitutional implications exist whenever a federal district court is asked to order a state entity to take regulatory action." *Id.* at 53. To that end, the court assumed that directly "ordering Volusia County to implement and enforce county-wide a 'turtle-friendlier' ordinance would violate the separation of powers." *Id.* at 54. Nevertheless, it found that the

district court has "a wide range of effective injunctive relief." *Id.*

> [T]he district court could strike Volusia County's ordained exemption of Daytona Beach and Daytona Beach Shores from [the Ordinance] . . . . Similarly, the district court could declare that those minimum standards, even if fully enforced, fail to prevent "harm" to protected sea turtles in Ormond Beach and New Smyrna Beach and . . . order Volusia County to form a committee and propose a solution.

Id. at 55 (citations omitted).

Following the Eleventh Circuit's decision and its denial of the County's petition for rehearing, *see id.* at 121, the County filed its petition for certiorari with this Court.

REASONS FOR GRANTING THE PETITION

THE ELEVENTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE RELEVANT DECISIONS OF THIS COURT

"[O]ne of the strongest possible grounds for securing the issuance of a writ of certiorari," ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 174 (7th ed. 1993), occurs when "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c). "To justify a grant of certiorari, the conflict must truly be direct and must be

readily apparent from the lower court's rationale or result." STERN, *supra*, at 174. This is such a case.

A. The Eleventh Circuit's Decision Conflicts with the Court's Decisions Interpreting the Tenth Amendment

The Eleventh Circuit has decided that the County must proceed to trial on the question whether its Ordinance restricts artificial beachfront lighting strictly enough to prevent harm to sea turtles protected under the ESA. *See* Pet. App. 41. The County's only defense against liability on this point, according to the court below, is that the Ordinance in fact prevents sea turtles from suffering harm from such lighting. *See id.* at 44. It would be difficult to overstate the significance of the court's decision. A political subdivision of the State of Florida has been ordered to stand trial in federal district court to defend itself from liability under the ESA, and its only defense is that its regulation prevents all harm caused by artificial beachfront lighting to protected sea turtles within its borders. This decision simply cannot be reconciled with the decisions of this Court interpreting the Tenth Amendment.

1. The Constitution prohibits the federal government from commandeering state and local governments

The Tenth Amendment "reserve[s] to the States . . . or to the people," U.S. CONST. amend. X, all "powers not delegated to the United States by the Constitution, nor prohibited by it to the States." *Id.* The Constitution's delegation and reservation of powers between the federal government and the states

created a system of dual sovereignty, which divides power to preserve liberty. *See Gregory v. Ashcroft*, 501 U.S. 452, 458–59 (1991). Whatever the other complications of our federal system—and they are legion—"the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992) (citation omitted). The Court has recently expressed this understanding in terms of a categorical rule:

> The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Printz v. United States, 117 S. Ct. 2365, 2384 (1997).

The Court has consistently refused to permit the federal government to commandeer state and local governments for its own purposes. *See EPA v. Brown*, 431 U.S. 99 (1977); *New York v. United States*, 505 U.S. 144, 176 (1992); *Printz v. United States*, 117 S. Ct. 2365 (1997). Twice the Court upheld federal statutes only after determining that the challenged statutory commands did not breach this rule. In both cases, the Court upheld the challenged provision "only as a precondition to continued state regulation of an otherwise preempted field," *id.* at 2380. *See Hodel v.*

Virginia Surface Mining & Reclam. Ass'n., Inc., 452 U.S. 264, 288 (1981); *FERC v. Mississippi*, 456 U.S. 742, 764-65 (1982). Furthermore, even in these cases, the Court affirmed that it "never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." *Id.* at 761–62.

Aside from fidelity to the political structure established by the Constitution, two reasons counsel against allowing the federal government to commandeer state or local governments. The first is to prevent the concentration of power, which endangers liberty. *See Gregory v. Ashcroft*, 501 U.S. 452, 458–59 (1991). The second is to enhance political accountability.

> [W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the view of the local electorate in matters not pre-empted by federal regulation.

New York v. United States, 505 U.S. 144, 168–69 (1992) (citing Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 61–62 (1988); LaPierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW. U.L. REV. 577, 639-65 (1985)).

2. The Eleventh Circuit's decision presents a genuine conflict with this Court's decisions prohibiting the federal government from commandeering state and local governments

The Eleventh Circuit's decision creates a genuine conflict with this Court's decisions at several points.

First, the majority below remanded the case for a trial on the question whether Volusia County has adopted a sufficiently "turtle-friendly" ordinance to prevent all federally protected sea turtles within its jurisdiction from being harmed by artificial beachfront lighting. *See* Pet. App. 64. The bare fact of such a trial, standing alone, poses a grave threat to our system of dual sovereignty and an intolerable intrusion on Volusia County's autonomy. If Congress transgresses the Constitution by presenting states with a Hobson's choice between "accepting ownership of waste or regulating according to the instructions of Congress, *New York v. United States*, 505 U.S. 144, 175 (1992), or by obligating state and local law enforcement officers "to perform background checks on prospective handgun purchasers," *Printz v. United States*, 117 S. Ct. 2365, 2383 (1997), then the Eleventh Circuit's decision is constitutionally impermissible on exactly the same grounds. Federal courts have no authority to compel state and local governments to choose between regulating to the limit of their authority or risking liability under federal law. "It is the very *principle* of separate state sovereignty that such a [decision] offends . . . ." *Id.* at 2383.[2]

[2] Moreover, neither the distinction between a congressional act and a judicial decision, nor between states and their political

(continued...)

Second, the Eleventh Circuit has, in effect, instructed the district court to conduct the trial in a way that heightens the constitutional offense. Those instructions include the repeated admonition to focus exclusively on the County's regulatory acts and omissions. Pet. App. 43-44. The majority took great pains to say that neither proof of third party acts nor the comparatively limited enforcement obligation of state and local governments under the ESA[3] would shelter the County from liability at trial. *See id.* at 47-52. Rather, the only defense available to the County, given the decision below, is that the Ordinance restricts artificial beachfront lighting severely enough to prevent take of all federally protected turtles within its borders—from any lighting source whatever. *See id.* at 44. And even that cramped defense appears illusory, since the district court has already found that "artificial beachfront lighting is responsible for the 'taking' of these sea turtles on the beaches of Volusia County." *Id.* at 113.

Third, to avoid the "unique constitutional implications," *id.* at 53, posed by Respondents' demand for an injunction ordering the County to prohibit all

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[2] (...continued)
subdivisions, eliminates the constitutional difficulties. The Tenth Amendment applies to all branches of the federal government, including the courts. *Strahan v. Coxe*, 127 F.3d 155, 169 (1st Cir. 1997), and the County has an undoubted right to raise its Tenth Amendment claim. *See Printz v. United States*, 117 S. Ct. 2365, 2382 n.15 (1997); *Board of Nat. Res. v. Brown*, 992 F.2d 937, 945–46 (9th Cir. 1993) (Clifford, J.).

[3] The U.S. Fish and Wildlife Service—not state and local governments—bears the statutory duty to prevent take of sea turtles caused by artificial beachfront lighting, and it has carried out that duty in Florida before. *See* Katherine R. Butler, Comment, *Coastal Protection of Sea Turtles in Florida*, 13 J. LAND USE & ENVTL. L. 399, 427 (1998).

"'harmful' lighting," *id.*, the majority below recommended two alternative remedies. The district court can "strike Volusia County's ordained exemption of Daytona Beach and Daytona Beach Shores from [coverage under the Ordinance]." *Id.* at 55. Or it can "order Volusia County to form a committee and propose a solution." *Id.*

Both remedies violate this Court's anticommandeering rule. That rule forbids the federal government to "issue directives requiring the States to address particular problems" or "command the States' officers, *or those of their political subdivisions*, to administer or enforce a federal regulatory program." *Printz v. United States*, 117 S. Ct. 2365, 2384 (1997) (emphasis added).

Striking portions of the Ordinance that exempt Daytona Beach and Daytona Beach Shores from regulation would have the effect of commanding the County's officials "to administer or enforce a federal regulatory program." *Id.* But for the court of appeals' proposed judicial amendment, the Ordinance would not require the County to enforce the ESA by restricting existing beachfront lighting in those areas.

Ordering the County to form a committee and, in turn, ordering the committee to propose a solution falls afoul of both prongs of the rule. Such judicial orders direct the County "to address particular problems" and command County officials "to administer or enforce" the ESA. *Id.* Furthermore, this remedy leaves a substantial question unanswered. Can any solution proposed by the committee fully redress Respondents' claim—the Ordinance takes protect sea turtles by failing to adequately restrict

lighting—*without* amending existing beachfront lighting regulations or proposing new ones? Because the answer almost certainly is "not," an order directing the formation of a committee to propose a solution turns out to be an order either directing the County to make particular laws or to authorize lawmaking by judicial proxy. If Congress cannot foist such directions on states, *see New York v. United States*, 505 U.S. 144, 188 (1992), neither can federal courts.

For these reasons, the Eleventh Circuit's attempt to avoid conflict with this Court's decisions under the Tenth Amendment ultimately fails.

B. The Eleventh Circuit's Decision Is Sufficiently Important to Warrant this Court's Review

Aside from the evident importance of the conflict we have described, other factors establish that the decision below merits this Court's review.

First, this case turns on the interpretation of the ESA. As a comprehensive effort to protect wildlife from extinction, the ESA represents one of the most far-reaching federal environmental laws on the books. *TVA v. Hill*, 437 U.S. 153, 180 (1978). Its proper interpretation is therefore a matter of obvious importance.

Second, the Eleventh Circuit has given the ESA an interpretation that has broad consequences for the Act's enforcement, both within that circuit and across the country. The panel's decision dramatically expands liability under the ESA. Three members of this Court have already pointed out the legal and

practical defects of attaching liability to indirect *private* acts. *See Babbitt v. Sweet Home Chap., Coms. For Ore.*, 515 U.S. 687, 714 (1995) (Scalia, J., dissenting). The majority below has taken one long step further, stretching the ESA to embrace indirect *public* acts as well. *See* Pet. App. 41. The consequences of this decision for every state and local government in the Nation is yet unknown, but the consequence for Volusia County is clear. It faces liability under the ESA unless it agrees to adopt stiffer regulations or somehow persuades the district court to change course and rule that beachfront lighting does not presently "take" protected sea turtles within Volusia County. *See id.* at 43–44.

Third, the Eleventh Circuit's opinion casts considerable doubt on the ESA's validity. As we have discussed at length, the court's reading of the ESA puts the Act on a collision course with a recent line of this Court's decisions interpreting the Tenth Amendment. Whether the majority's decision is best explained in terms of oversight, *see* Pet. App. 114 (cataloging the district court's perceived constitutional difficulties with ordering the County to structure its regulations in a particular way), indifference, or failure to honor the principle of constitutional doubt, *see Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), the result is the same. And mentioning that the County did not directly allege federalism concerns, *see* Pet. App. 53 n.26, in no way relieved the court of its duty to interpret the ESA in harmony with the Constitution.[4] *See id.*

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[4] Nor does the County's reference to "the separation of powers," Pet. App. 53, rather than "federalism" or the "Tenth Amendment" (continued...)

CONCLUSION

For the foregoing reasons, *amici curiae* Washington Legal Foundation and Allied Educational Foundation urge the Court to grant the petition.

Respectfully submitted,

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[4] (...continued)
foreclose it from raising a federalism claim before this Court. *Cf.* New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63, 67 (1928); Eddings v. Oklahoma, 455 U.S. 104, 113–14 n.9 (1982).

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Respondents rephrase the question presented for review, Opp. Cert. i, in order to contend that there are material disputed facts. Petitioner replies to show that the question is purely legal, and not factually dependent. Petitioner responds in limited measure to respondents' other reasons for denying the writ, but otherwise relies upon the argument in its petition.

Respondents state that their complaint seeks to enjoin petitioner from "affirmatively 'permitting' beachfront lighting." Opp. Cert. 6. The word "affirmatively" does not appear in the text cited by respondents. App. 179, 202. The complaint alleges that it is petitioner's "refusal to ban" artificial beachfront lighting which constitutes an unlawful taking of protected sea turtles. App. 161, 177. The claim for relief asserts that it is petitioner's "refusal to eliminate" artificial light sources that misorient sea turtles which constitutes the taking. App. 178.

Respondents further state that "nowhere in the pleadings do [they] contend they are challenging a 'failure to regulate.' " Opp. Cert. 5. The Eleventh Circuit apparently thought otherwise. It found that respondent had "standing to sue for inadequate *regulation*, the Turtles' core theory of causation." App. 43. The Eleventh Circuit directed the district court to determine whether petitioner's ordinance is "insufficient on its face to prevent 'harm,' " App. 44, and to "focus . . . on the regulatory acts" of petitioner. App. 43. It stated that where petitioner has not required retrofitting of existing lighting, "the trier of fact's inquiry can simply be whether the lack of artificial beachfront lighting restrictions causes

'harm' to sea turtles. . . . " App. 44. The causal connection contemplated by the Eleventh Circuit for " 'harmfully' inadequate regulation," App. 41, is therefore clearly based upon an absence, insufficiency, or laxity of regulation, and not affirmative permission.

The conclusions of the Eleventh Circuit regarding respondents' standing are ones purely of law. No facts are required to evaluate its logic that by a failure to prohibit, petitioner "purports to make an activity lawful." App. 47. No evidence is necessary to understand the premise that petitioner "ordain[s] beachfront lighting, allowing landowners to use lights. . . . " App. 47. This view of causation, where permission for individual conduct occurs because of the absence of local regulation, will not be given factual texture by a trial.

Respondents disavow their previously evident cause of action, while conceding that petitioner does not violate Section 9 of the Endangered Species Act, 16 U.S.C. § 1538, by a failure to act affirmatively, or to enact or enforce a federal program. Opp. Cert. 11-12. They acknowledge the constitutional limitations upon Congress recognized by the decisions of this Court in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 98 (1997). Opp. Cert. 11. But they argue strangely, in view of the Eleventh Circuit's decision, that the Tenth Amendment is not implicated because the statute contains no such requirement. Opp. Cert. 12.

Respondents have no obvious explanation why the Eleventh Circuit found it necessary to declare their standing to hold petitioner liable for " 'harmfully' inadequate regulation," App. 41, and no meaningful defense for its

decision. The decision of the Eleventh Circuit that petitioner seeks to have this Court review is clearly erroneous on the question presented, even if as in respondents' apparent view, it is based on an inaccurate understanding of the pleadings.

Petitioner could have more precisely raised to the court of appeals the question presented here. *Cf. Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374 (1995) (permitting new argument in support of consistent claim). The court of appeals understood though that petitioner's fundamental concern was that "*granting the requested relief*, that is, enjoining it from permitting 'harmful' lighting, *would be tantamount to ordering it to legislate* in violation of separation of powers." App. 53 [Emphasis supplied]. It was clear to the Eleventh Circuit that "unique constitutional implications exist whenever a *federal* district court is asked to order a *state* entity to take regulatory action. . . . " App. 53 [Emphasis supplied].

The Eleventh Circuit's seeming awareness of this court's decisions in *New York* and *Printz* is indicated by its reliance upon *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997), *cert. denied*, ___ U.S. ___, 119 S.Ct. 81 (1998). In *Strahan*, the First Circuit distinguished *New York* and *Printz* because there the state agency violated the law by expressly permitting the conduct which inevitably resulted in the harm, *Strahan, supra* at 164, 170, and was not being asked to take positive action. *Id.* at 170. Given the Eleventh Circuit's understanding that respondent's theory of causation is inadequate regulation, it seems an unduly tight reading by the court of petitioner's assertion of lack of redressability to not find *New York* and *Printz* to be "binding or persuasive authority to the contrary. . . . "

App. 55. The Eleventh Circuit should have applied the directly controlling precedent of *New York* and *Printz* even if it felt that the reasoning of other cases applied. *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997, 2017 (1997); *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

Respondents suggest that review by this Court is inappropriate because petitioner may further legislate, or apply for the issuance of an incidental take permit. Petitioner does as a policy matter contemplate further legislation, but seeks to be relieved now, and in the future, from the threat of liability posed by the decision of the Eleventh Circuit that it must prevent harm to protected species. App. 44. Petitioner has in response to the Eleventh Circuit's decision, considered, but not made, further application for an incidental take permit. However, unless the Eleventh Circuit is correct that there exists a cause of action for " 'harmfully' inadequate regulation," App. 41, it appears unnecessary and wasteful of resources, for petitioner to submit its local authority to the enforced continuing scrutiny of a federal agency. The question presented by petitioner, whether a county government can be held responsible under the Endangered Species Act by a federal court for the acts of private citizens by its failure to regulate beachfront lighting, should be reviewed by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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